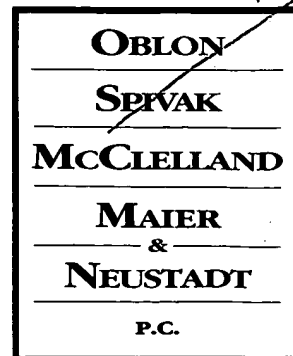




Docket No.: 208594US0

COMMISSIONER FOR PATENTS  
ALEXANDRIA, VIRGINIA 22313



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RE: Application Serial No.: 09/875,994

Applicants: Bruno BIATRY

Filing Date: June 8, 2001

For: USE OF PHYTANETRIOL AS AN ANTI-  
POLLUTION AGENT, IN PARTICULAR IN A  
COSMETIC COMPOSITION

Group Art Unit: 1617

Examiner: YU, G.C.

SIR:

Attached hereto for filing are the following papers:

**APPEAL BRIEF W/APPENDIX A (IN TRIPLICATE)**

Our check in the amount of **\$330.00** is attached covering any required fees. In the event any variance exists between the amount enclosed and the Patent Office charges for filing the above-noted documents, including any fees required under 37 C.F.R. 1.136 for any necessary Extension of Time to make the filing of the attached documents timely, please charge or credit the difference to our Deposit Account No. 15-0030. Further, if these papers are not considered timely filed, then a petition is hereby made under 37 C.F.R. 1.136 for the necessary extension of time. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,  
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208594US0



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF: :

Bruno BIATRY : EXAMINER: YU

SERIAL NO.: 09/875,994 :

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IN A COSMETIC COMPOSITION

**APPEAL BRIEF**

ASSISTANT COMMISSIONER FOR PATENTS  
WASHINGTON, D.C. 20231

SIR:

Appellant submits this brief in response to the Final Rejection dated July 29, 2003.

**REAL PARTY IN INTEREST**

The real party in interest herein is L'Oreal S.A. of Paris, France.

**RELATED APPEALS AND INTERFERENCES**

To the best of Appellant's knowledge, there are no other appeals or interferences which will directly affect or be directly affected by, or have a bearing on, the Board's decision in this appeal.

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### **STATUS OF CLAIMS**

Claims 1-24 and 26-31 are pending and appealed herein. Claims 25 and 32-36 have been canceled.

### **STATUS OF AMENDMENTS**

All amendments and remarks filed in this case have been entered and considered.

### **SUMMARY OF INVENTION**

The invention relates to methods of protecting keratin materials from the harmful effects of pollution by topically applying a composition containing a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need of such protection. (Specification at page 2, lines 28-29 and page 16, line 10 et seq.).

The invention also relates to methods for improving the cell respiration and/or for reducing the desquamation of a keratin material and/or for preventing an increase in sebum flow from a keratin material by applying to a keratin material in need of said improvement, reduction and/or prevention a composition containing a pollutant penetration limiting effective amount of phytanetriol. (Specification at page 3, lines 8-13 and page 16, line 10 et seq.).

### **ISSUES**

1. Whether The Pending Claims Are Anticipated By Ribier I.
2. Whether Claims 1-6, 15, 17-19, 21, 23, 24 and 26-29 Are Obvious Over Kuraray alone or in combination with Ribier II, Murad or Bergmann.

### **GROUPING OF CLAIMS**

The claims do not stand or fall together. Each claim stands individually, and in the argument section provided below Appellant explains why the claims are each separately patentable, one from the other.

### **ARGUMENT**

The present invention relates to methods of protecting keratin materials in need of protection from the harmful effects of pollution, and to methods of improving cell respiration, reducing desquamation, and/or preventing keratin materials from becoming dull and/or dirty, by limiting pollutant penetration into keratin materials in need of such protection, improvement, reduction and/or prevention. Accordingly, the pending claims require applying phytanetriol to keratin materials (1) in need of such protection, improvement, reduction and/or prevention (2) in an amount sufficient to limit the amount of pollutants penetrating into the skin to effect such protection, improvement, reduction and/or prevention. None of the cited art teaches or suggests the invention methods.

Regarding the rejection under § 102, it is undisputed that Ribier I does not expressly disclose the invention methods. The Examiner attempts to compensate for Ribier I's complete failure to disclose these methods by asserting that Ribier I inherently anticipates them.

For Ribier I to inherently anticipate the invention methods, it must necessarily result in limiting the penetration of pollutants to keratin materials in need of the claimed protection, improvement, reduction and/or prevention. *See, Eli Lilly & Co. v. Barr Laboratories, Inc.*, 251 F.3d 955 (Fed. Cir. 2001)(inherent anticipation requires that the claimed invention

necessarily result from the prior art disclosure), *Abbot Laboratories v. Baxter Pharmaceutical Products, Inc.*, 67 U.S.P.Q.2d 1191 (Fed. Cir. 2003) (“effective amounts” are not necessarily disclosed by prior art compositions containing the claimed active ingredient; the desired effect must be achieved) and *Jansen v. Rexall Sundown Inc.*, 68 U.S.P.Q.2d 1154 (“in need thereof” language is not satisfied if the active ingredient is administered for a purpose other than the claimed purpose). In other words, the invention methods must naturally flow from Ribier I’s disclosure. See, *Eli Lilly, supra*. As noted in *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323 (CCPA 1981), the mere fact that a certain thing may result from a given set of circumstances is not sufficient to prove inherency: inherency may not be established by probabilities or possibilities.

Ribier I does not contain any disclosure that would result in a person using a pollution penetration limiting effective amount of phytanetriol on keratin materials in need of the claimed protection, improvement, reduction and/or prevention each and every time Ribier I’s compositions were used. For example, for pollution penetration limitation to occur, sufficient pollution must exist in the atmosphere for phytanetriol to be able to effect limitation of such penetration. However, geographic areas exist in which pollution generation is limited such that insufficient pollution exists in the atmosphere to allow phytanetriol to limit penetration in this manner (for example, Mackinac Island in Michigan where no motor vehicles are allowed and little or no industry exists, or a Hawaiian Island which contains little or no industry and strong winds/plentiful rain). Thus, not every person using Ribier I’s compositions in such locations would limit pollution penetration on keratin materials.<sup>1</sup> Similarly, not every keratin

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<sup>1</sup> The Examiner asserts that UV radiation is a pollutant, and that all geographical areas are subject to UV radiation. (Office Action dated July 29, 2003 at pages 3-4). However, UV radiation is not a pollutant in the context of the invention methods. (See, Specification at page 1, lines 19-23). Accordingly, this assertion is not relevant to the invention methods.

material in such locations would necessarily be in need of the claimed protection, improvement, reduction and/or prevention. Because not every person using Ribier I's compositions would limit pollution penetration on keratin materials and because not every keratin material would necessarily be in need of the claimed protection, improvement, reduction and/or prevention, Ribier I cannot and inevitably does not lead to the invention methods. Accordingly, Ribier I does not inherently anticipate the invention methods.

Moreover, Ribier I does not provide any instruction regarding how to use or apply his compositions. Thus, Ribier I does not contain any teaching regarding application or use that would result each and every time in limiting penetration of pollutants into skin to effect the claimed protection, improvement, reduction and/or prevention on skin in need of such protection, improvement, reduction and/or prevention. Merely because Ribier I discloses compositions containing phytanetriol does not mean that it discloses compositions containing a pollutant penetration limiting effective amount of phytanetriol. *See, Abbott Laboratories, supra*. Similarly, merely because Ribier I discloses compositions containing phytanetriol does not mean that it discloses the invention methods which require application to skin in need of the claimed protection, improvement, reduction and/or prevention. *See, Rexall, supra*. Accordingly, Ribier I does not inherently anticipate the invention methods.

In the most recent Office Action (dated July 29, 2003), the Examiner responds to the above arguments by asserting that because Ribier I constitutes prior art under §102(b) and, thus, was "known" in all areas of the U.S., Appellant's arguments are irrelevant. (Office Action dated July 29, 2003 at page 3). The Examiner's response misses the point. Appellant does not contest that Ribier I issued earlier enough to qualify as prior art. Rather, Appellant is demonstrating that Ribier I does not necessarily result in the claimed protection, improvement, reduction and/or prevention because applying phytanetriol to keratin materials

(1) in need of such protection, improvement, reduction and/or prevention (2) in an amount sufficient to limit the amount of pollutants penetrating into the skin to effect such protection, improvement, reduction and/or prevention does not necessarily flow from Ribier I.

Thus, the rejection of all pending claims as inherently anticipated by Ribier I is improper.

Because claims 7-14, 16, 20, 22, 30 and 31 were not rejected under 35 U.S.C. §103, these claims are in condition for allowance upon reversal of the anticipation rejection.

Regarding the §103 rejections, none of the cited references teaches or suggests the invention methods which require applying a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need thereof. Kuraray, the primary reference, merely discloses that phytanetriol protects hair and skin, but does not state how or from what such protection occurs. Thus, Kuraray neither teaches nor suggests using a pollutant penetration limiting effective amount of phytanetriol. Rather, Kuraray's protection could come from any source such as, for example, phytanetriol's known moisturizing properties (arguably, moisturizing compositions "protect" hair and skin because they prevent dehydration). None of the secondary references, Ribier II, Bergman or Murad, compensate for Kuraray's deficiencies. None of these secondary references teach or suggest using a pollutant penetration limiting effective amount of phytanetriol to achieve the claimed protection. Thus, the combination of the cited references cannot yield the invention methods and, thus, cannot render them obvious.

In view of the above, Appellant respectfully submits that the present claims are in condition for allowance, and that the pending rejection should be REVERSED.

Each dependent claim similarly points out and describes a patentable invention neither disclosed nor suggested by the applied prior art. These claims themselves are separately patentable.

Claims 2 and 3, each separately patentable, require the presence of specific effective amounts of phytanetriol. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being significant for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such amounts.

Claims 4, 26 and 29, each separately patentable, are method claims requiring the phytanetriol containing composition to be an emulsion. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being important for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such a composition.

Claims 5, 6, 27 and 30, each separately patentable, are method claims requiring the phytanetriol to be in the form of cubic gel particles, particularly in aqueous dispersion. Nowhere does the cited art teach or suggest phytanetriol cubic gel particles limiting pollution penetration into keratin materials or any pollution penetration benefits resulting from the phytanetriol being in such form.

Claims 7-14, each separately patentable, are method claims requiring the phytanetriol to be in the form of cubic gel particles and formed from specific mixtures of ingredients in specific amounts. Nowhere does the cited art teach or suggest phytanetriol in such cubic gel particle form made using the specified ingredients in the specified amounts would possess pollution penetration limiting activity or any benefits arising from such activity.



Claims 15 and 16, each separately patentable, require a specific size range for phytanetriol containing cubic gel particles. None of the cited art describes or alludes to such cubic gel particles having pollution penetration limiting activity or any benefits associated with such activity.

Claims 17 and 18, each separately patentable, are method claims further requiring the presence of at least one water-insoluble ionic amphiphilic lipid in the phytanetriol containing cubic gel particles. None of the cited art teaches or suggests combining such an additional component to compositions containing pollution penetration limiting effective amounts of phytanetriol or any benefits resulting from such a combination.

Claims 19 and 20, each separately patentable, are method claims further requiring the presence of at least one active agent in the phytanetriol containing cubic gel particles. None of the cited art teaches or suggests combining such an additional component to compositions containing pollution penetration limiting effective amounts of phytanetriol or any benefits resulting from such a combination.

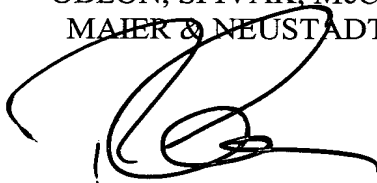
Claims 21 and 22, each separately patentable, require the presence of specific effective amounts of phytanetriol containing cubic gel particles. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being significant for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such amounts.

Claims 28 and 31, each separately patentable, require the keratin material to which the phytanetriol is applied to be skin. Nowhere does the cited art describe or allude to applying phytanetriol to skin for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such composition on skin.

Accordingly, in view of the above remarks and reasons explaining the patentable distinctness of the presently appealed claims over the applied prior art, Appellant requests that the Examiner's rejections all be REVERSED.

Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,  
MAIER & NEUSTADT, P.C.

A handwritten signature in black ink, appearing to be 'R. Treanor', written over the firm name.

Richard L. Treanor  
Attorney of Record  
Registration No. 36,379

Jeffrey B. McIntyre  
Registration No. 36,867

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## APPENDIX A

1. (Previously Presented): A method of protecting keratin materials from the harmful effects of pollution, comprising topically applying a composition comprising a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need of protection from the harmful effects of pollution.

2. (Original): The method of claim 1, wherein said effective amount ranges from 0.001 to 20% by weight, based on the weight of the composition.

3. (Original): The method of claim 1, wherein said effective amount ranges from 0.1% to 10% by weight, based on the weight of the composition.

4. (Original): The method of claim 1, wherein said composition is an emulsion.

5. (Original): The method of claim 1, wherein the phytanetriol is in the form of cubic gel particles.

6. (Original): The method of claim 5, wherein the cubic gel particles are in aqueous dispersion.

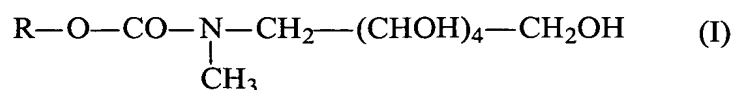
7. (Original): The method of claim 1, wherein the phytanetriol is in the form of cubic gel particles, and wherein said cubic gel particles are formed from a mixture comprising:

(i) 0.1% to 15% by weight, relative to the total weight of the composition, of phytanetriol or of a mixture of phytanetriol with a compound selected from the group consisting of N-2-alkoxycarbonyl derivatives of N-methylglucamine and unsaturated fatty acid monoglycerides; and

(ii) 0.05 to 3% by weight, relative to the total weight of the composition, of at least one dispersing and stabilizing agent, said agent being selected from the group consisting of surfactants that are water-soluble at room temperature and containing a saturated or unsaturated, linear or branched fatty chain containing from 8 to 22 carbon atoms.

8. (Original): The method of claim 7, wherein a weight proportion of compound (i) to said dispersing and stabilizing agent (ii) ranges from 2 to 200.

9. (Original): The method of claim 7, wherein said N-2-alkoxycarbonyl derivative of N-methylglucamine corresponds to formula (I) below:



in which R represents a branched alkyl radical containing from 6 to 18 carbon atoms.

10. (Original): The method of claim 7, wherein said N-2-alkoxycarbonyl derivative of N-methylglucamine is selected from the group consisting of N-2-hexyldecyloxycarbonyl-N-methylglucamine, N-2-ethyl-hexyloxycarbonyl-N-methylglucamine and N-2-butyloxyloxycarbonyl-N-methylglucamine, and mixtures thereof.

11. (Original): The method of claim 7, wherein said cubic gel particles contain as compound (i) a mixture consisting of from 1% to 40% by weight of phytanetriol relative to the weight of the mixture and from 60% to 99% by weight of N-2-alkoxycarbonyl derivative of N-methylglucamine relative to the weight of the mixture.

12. (Original): The method of claim 7, wherein said unsaturated fatty acid monoglyceride is selected from the group consisting of glyceryl monooleate, glyceryl monolinoleate, and mixtures thereof.

13. (Original): The method of claim 7, wherein said cubic gel particles contain as compound (i) a mixture consisting of from 1% to 50% by weight of phytanetriol relative to the weight of the mixture and from 50% to 99% by weight of unsaturated fatty acid monoglyceride relative to the weight of the mixture.

14. (Original): The method of claim 7, wherein said dispersing and stabilizing agent is selected from the group consisting of:

- (1) alkyl or alkenyl ethers or esters of a polyol,
- (2) N-acyl amino acids and derivatives thereof, and peptides N-acylated with an alkyl or alkenyl radical, and salts thereof,
- (3) alkyl or alkenyl ether or ester sulphates, derivatives thereof and salts thereof,
- (4) polyoxyethylenated fatty alkyl or alkenyl ethers or esters,
- (5) polyoxyethylenated alkyl or alkenyl carboxylic acids and salts thereof,
- (6) N-alkyl or alkenyl betaines,
- (7) alkyl or alkenyl trimethylammoniums and salts thereof, and
- (8) mixtures thereof.

15. (Original): The method of claim 5, wherein said cubic gel particles have a size ranging from 0.05  $\mu\text{m}$ . to 1  $\mu\text{m}$ .

16. (Original): The method of claim 7, wherein said cubic gel particles have a size ranging from 0.05  $\mu\text{m}$ . to 1  $\mu\text{m}$ .

17. (Original): The method of claim 6, wherein the dispersion of cubic gel particles further comprises at least one water-insoluble ionic amphiphilic lipid.

18. (Original): The method of claim 17, wherein said water-insoluble ionic amphiphilic lipid is at least one selected from the group consisting of:

- (i) phospholipids,
- (ii) phosphoric esters of fatty acids,
- (iii) water-insoluble N-acyl derivatives of glutamic acid and salts thereof,
- (iv) sodium cetyl sulphate,
- (v) sodium cocoylmonoglyceride sulphate, and
- (vi) water-insoluble quaternary ammonium derivatives.

19. (Original): The method of claim 5, wherein said cubic gel particles further comprise at least one hydrophilic and/or lipophilic active principle.

20. (Original): The method of claim 7, wherein said cubic gel particles further comprise at least one hydrophilic and/or lipophilic active principle.

21. (Original): The method of claim 5, wherein the cubic gel particles are present in an amount ranging from 0.1% to 20% by weight relative to the total weight of the composition.

22. (Original): The method of claim 7, wherein the cubic gel particles are present in an amount ranging from 0.1% to 20% by weight relative to the total weight of the composition.

23. (Previously Presented): A treatment process for protecting a keratin material against the effects of pollution, comprising applying to a keratin material in need of protection from the effects of pollution a composition comprising a pollutant penetration limiting effective amount of phytanetriol in a physiologically acceptable medium.

24. (Previously Presented): A treatment process for improving the cell respiration and/or for reducing the desquamation of a keratin material and/or for preventing an increase in sebum flow from a keratin material comprising applying to a keratin material in need of said improvement, reduction and/or prevention a composition comprising a pollutant penetration limiting effective amount of phytanetriol in a physiologically acceptable medium.

25. (Canceled).

26. (Original): The process of claim 23, wherein said is an emulsion.

27. (Original): The process of claim 23, wherein the phytanetriol is in the form of cubic gel particles.

28. (Original): The process of claim 23, wherein said keratin material is the skin.

29. (Original): The process of claim 24, wherein said is an emulsion.

30. (Original): The process of claim 24, wherein the phytanetriol is in the form of cubic gel particles.

31. (Original): The process of claim 24, wherein said keratin material is the skin.

32-36. (Canceled).

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Bruno BIATRY : EXAMINER: YU

SERIAL NO.: 09/875,994 :

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**APPEAL BRIEF**

ASSISTANT COMMISSIONER FOR PATENTS  
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**REAL PARTY IN INTEREST**

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**RELATED APPEALS AND INTERFERENCES**

To the best of Appellant's knowledge, there are no other appeals or interferences which will directly affect or be directly affected by, or have a bearing on, the Board's decision in this appeal.



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### **SUMMARY OF INVENTION**

The invention relates to methods of protecting keratin materials from the harmful effects of pollution by topically applying a composition containing a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need of such protection. (Specification at page 2, lines 28-29 and page 16, line 10 et seq.).

The invention also relates to methods for improving the cell respiration and/or for reducing the desquamation of a keratin material and/or for preventing an increase in sebum flow from a keratin material by applying to a keratin material in need of said improvement, reduction and/or prevention a composition containing a pollutant penetration limiting effective amount of phytanetriol. (Specification at page 3, lines 8-13 and page 16, line 10 et seq.).

### **ISSUES**

1. Whether The Pending Claims Are Anticipated By Ribier I.
2. Whether Claims 1-6, 15, 17-19, 21, 23, 24 and 26-29 Are Obvious Over Kuraray alone or in combination with Ribier II, Murad or Bergmann.

### **GROUPING OF CLAIMS**

The claims do not stand or fall together. Each claim stands individually, and in the argument section provided below Appellant explains why the claims are each separately patentable, one from the other.

### **ARGUMENT**

The present invention relates to methods of protecting keratin materials in need of protection from the harmful effects of pollution, and to methods of improving cell respiration, reducing desquamation, and/or preventing keratin materials from becoming dull and/or dirty, by limiting pollutant penetration into keratin materials in need of such protection, improvement, reduction and/or prevention. Accordingly, the pending claims require applying phytanetriol to keratin materials (1) in need of such protection, improvement, reduction and/or prevention (2) in an amount sufficient to limit the amount of pollutants penetrating into the skin to effect such protection, improvement, reduction and/or prevention. None of the cited art teaches or suggests the invention methods.

Regarding the rejection under § 102, it is undisputed that Ribier I does not expressly disclose the invention methods. The Examiner attempts to compensate for Ribier I's complete failure to disclose these methods by asserting that Ribier I inherently anticipates them.

For Ribier I to inherently anticipate the invention methods, it must necessarily result in limiting the penetration of pollutants to keratin materials in need of the claimed protection, improvement, reduction and/or prevention. *See, Eli Lilly & Co. v. Barr Laboratories, Inc.*, 251 F.3d 955 (Fed. Cir. 2001)(inherent anticipation requires that the claimed invention

necessarily result from the prior art disclosure), *Abbot Laboratories v. Baxter Pharmaceutical Products, Inc.*, 67 U.S.P.Q.2d 1191 (Fed. Cir. 2003)(“effective amounts” are not necessarily disclosed by prior art compositions containing the claimed active ingredient; the desired effect must be achieved) and *Jansen v. Rexall Sundown Inc.*, 68 U.S.P.Q.2d 1154 (“in need thereof” language is not satisfied if the active ingredient is administered for a purpose other than the claimed purpose). In other words, the invention methods must naturally flow from Ribier I’s disclosure. See, *Eli Lilly, supra*. As noted in *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323 (CCPA 1981), the mere fact that a certain thing may result from a given set of circumstances is not sufficient to prove inherency: inherency may not be established by probabilities or possibilities.

Ribier I does not contain any disclosure that would result in a person using a pollution penetration limiting effective amount of phytanetriol on keratin materials in need of the claimed protection, improvement, reduction and/or prevention each and every time Ribier I’s compositions were used. For example, for pollution penetration limitation to occur, sufficient pollution must exist in the atmosphere for phytanetriol to be able to effect limitation of such penetration. However, geographic areas exist in which pollution generation is limited such that insufficient pollution exists in the atmosphere to allow phytanetriol to limit penetration in this manner (for example, Mackinac Island in Michigan where no motor vehicles are allowed and little or no industry exists, or a Hawaiian Island which contains little or no industry and strong winds/plentiful rain). Thus, not every person using Ribier I’s compositions in such locations would limit pollution penetration on keratin materials.<sup>1</sup> Similarly, not every keratin

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<sup>1</sup> The Examiner asserts that UV radiation is a pollutant, and that all geographical areas are subject to UV radiation. (Office Action dated July 29, 2003 at pages 3-4). However, UV radiation is not a pollutant in the context of the invention methods. (See, Specification at page 1, lines 19-23). Accordingly, this assertion is not relevant to the invention methods.

material in such locations would necessarily be in need of the claimed protection, improvement, reduction and/or prevention. Because not every person using Ribier I's compositions would limit pollution penetration on keratin materials and because not every keratin material would necessarily be in need of the claimed protection, improvement, reduction and/or prevention, Ribier I cannot and inevitably does not lead to the invention methods. Accordingly, Ribier I does not inherently anticipate the invention methods.

Moreover, Ribier I does not provide any instruction regarding how to use or apply his compositions. Thus, Ribier I does not contain any teaching regarding application or use that would result each and every time in limiting penetration of pollutants into skin to effect the claimed protection, improvement, reduction and/or prevention on skin in need of such protection, improvement, reduction and/or prevention. Merely because Ribier I discloses compositions containing phytanetriol does not mean that it discloses compositions containing a pollutant penetration limiting effective amount of phytanetriol. *See, Abbott Laboratories, supra*. Similarly, merely because Ribier I discloses compositions containing phytanetriol does not mean that it discloses the invention methods which require application to skin in need of the claimed protection, improvement, reduction and/or prevention. *See, Rexall, supra*. Accordingly, Ribier I does not inherently anticipate the invention methods.

In the most recent Office Action (dated July 29, 2003), the Examiner responds to the above arguments by asserting that because Ribier I constitutes prior art under §102(b) and, thus, was “known” in all areas of the U.S., Appellant’s arguments are irrelevant. (Office Action dated July 29, 2003 at page 3). The Examiner’s response misses the point. Appellant does not contest that Ribier I issued earlier enough to qualify as prior art. Rather, Appellant is demonstrating that Ribier I does not necessarily result in the claimed protection, improvement, reduction and/or prevention because applying phytanetriol to keratin materials

(1) in need of such protection, improvement, reduction and/or prevention (2) in an amount sufficient to limit the amount of pollutants penetrating into the skin to effect such protection, improvement, reduction and/or prevention does not necessarily flow from Ribier I.

Thus, the rejection of all pending claims as inherently anticipated by Ribier I is improper.

Because claims 7-14, 16, 20, 22, 30 and 31 were not rejected under 35 U.S.C. §103, these claims are in condition for allowance upon reversal of the anticipation rejection.

Regarding the §103 rejections, none of the cited references teaches or suggests the invention methods which require applying a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need thereof. Kuraray, the primary reference, merely discloses that phytanetriol protects hair and skin, but does not state how or from what such protection occurs. Thus, Kuraray neither teaches nor suggests using a pollutant penetration limiting effective amount of phytanetriol. Rather, Kuraray's protection could come from any source such as, for example, phytanetriol's known moisturizing properties (arguably, moisturizing compositions "protect" hair and skin because they prevent dehydration). None of the secondary references, Ribier II, Bergman or Murad, compensate for Kuraray's deficiencies. None of these secondary references teach or suggest using a pollutant penetration limiting effective amount of phytanetriol to achieve the claimed protection. Thus, the combination of the cited references cannot yield the invention methods and, thus, cannot render them obvious.

In view of the above, Appellant respectfully submits that the present claims are in condition for allowance, and that the pending rejection should be REVERSED.

Each dependent claim similarly points out and describes a patentable invention neither disclosed nor suggested by the applied prior art. These claims themselves are separately patentable.

Claims 2 and 3, each separately patentable, require the presence of specific effective amounts of phytanetriol. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being significant for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such amounts.

Claims 4, 26 and 29, each separately patentable, are method claims requiring the phytanetriol containing composition to be an emulsion. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being important for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such a composition.

Claims 5, 6, 27 and 30, each separately patentable, are method claims requiring the phytanetriol to be in the form of cubic gel particles, particularly in aqueous dispersion. Nowhere does the cited art teach or suggest phytanetriol cubic gel particles limiting pollution penetration into keratin materials or any pollution penetration benefits resulting from the phytanetriol being in such form.

Claims 7-14, each separately patentable, are method claims requiring the phytanetriol to be in the form of cubic gel particles and formed from specific mixtures of ingredients in specific amounts. Nowhere does the cited art teach or suggest phytanetriol in such cubic gel particle form made using the specified ingredients in the specified amounts would possess pollution penetration limiting activity or any benefits arising from such activity.

Claims 15 and 16, each separately patentable, require a specific size range for phytanetriol containing cubic gel particles. None of the cited art describes or alludes to such cubic gel particles having pollution penetration limiting activity or any benefits associated with such activity.

Claims 17 and 18, each separately patentable, are method claims further requiring the presence of at least one water-insoluble ionic amphiphilic lipid in the phytanetriol containing cubic gel particles. None of the cited art teaches or suggests combining such an additional component to compositions containing pollution penetration limiting effective amounts of phytanetriol or any benefits resulting from such a combination.

Claims 19 and 20, each separately patentable, are method claims further requiring the presence of at least one active agent in the phytanetriol containing cubic gel particles. None of the cited art teaches or suggests combining such an additional component to compositions containing pollution penetration limiting effective amounts of phytanetriol or any benefits resulting from such a combination.

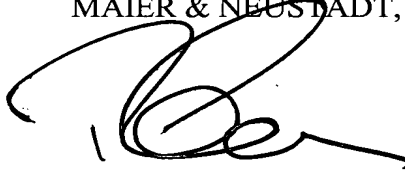
Claims 21 and 22, each separately patentable, require the presence of specific effective amounts of phytanetriol containing cubic gel particles. Nowhere does the cited art describe or allude to this additional characteristic of the claimed methods as being significant for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such amounts.

Claims 28 and 31, each separately patentable, require the keratin material to which the phytanetriol is applied to be skin. Nowhere does the cited art describe or allude to applying phytanetriol to skin for limiting pollution penetration, nor does the cited art describe or suggest any pollution penetration limiting benefits resulting from the use of such composition on skin.

Accordingly, in view of the above remarks and reasons explaining the patentable distinctness of the presently appealed claims over the applied prior art, Appellant requests that the Examiner's rejections all be REVERSED.

Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,  
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A handwritten signature in black ink, appearing to be 'Richard L. Treanor', written over the firm name.

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## APPENDIX A

1. (Previously Presented): A method of protecting keratin materials from the harmful effects of pollution, comprising topically applying a composition comprising a pollutant penetration limiting effective amount of phytanetriol to keratin materials in need of protection from the harmful effects of pollution.

2. (Original): The method of claim 1, wherein said effective amount ranges from 0.001 to 20% by weight, based on the weight of the composition.

3. (Original): The method of claim 1, wherein said effective amount ranges from 0.1% to 10% by weight, based on the weight of the composition.

4. (Original): The method of claim 1, wherein said composition is an emulsion.

5. (Original): The method of claim 1, wherein the phytanetriol is in the form of cubic gel particles.

6. (Original): The method of claim 5, wherein the cubic gel particles are in aqueous dispersion.

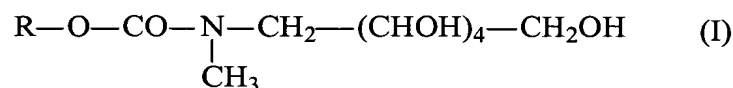
7. (Original): The method of claim 1, wherein the phytanetriol is in the form of cubic gel particles, and wherein said cubic gel particles are formed from a mixture comprising:

(i) 0.1% to 15% by weight, relative to the total weight of the composition, of phytanetriol or of a mixture of phytanetriol with a compound selected from the group consisting of N-2-alkoxycarbonyl derivatives of N-methylglucamine and unsaturated fatty acid monoglycerides; and

(ii) 0.05 to 3% by weight, relative to the total weight of the composition, of at least one dispersing and stabilizing agent, said agent being selected from the group consisting of surfactants that are water-soluble at room temperature and containing a saturated or unsaturated, linear or branched fatty chain containing from 8 to 22 carbon atoms.

8. (Original): The method of claim 7, wherein a weight proportion of compound (i) to said dispersing and stabilizing agent (ii) ranges from 2 to 200.

9. (Original): The method of claim 7, wherein said N-2-alkoxycarbonyl derivative of N-methylglucamine corresponds to formula (I) below:



in which R represents a branched alkyl radical containing from 6 to 18 carbon atoms.

10. (Original): The method of claim 7, wherein said N-2-alkoxycarbonyl derivative of N-methylglucamine is selected from the group consisting of N-2-hexyldecyloxycarbonyl-N-methylglucamine, N-2-ethyl-hexyloxycarbonyl-N-methylglucamine and N-2-butyloctyloxycarbonyl-N-methylglucamine, and mixtures thereof.

11. (Original): The method of claim 7, wherein said cubic gel particles contain as compound (i) a mixture consisting of from 1% to 40% by weight of phytanetriol relative to the weight of the mixture and from 60% to 99% by weight of N-2-alkoxycarbonyl derivative of N-methylglucamine relative to the weight of the mixture.

12. (Original): The method of claim 7, wherein said unsaturated fatty acid monoglyceride is selected from the group consisting of glyceryl monooleate, glyceryl monolinoleate, and mixtures thereof.

13. (Original): The method of claim 7, wherein said cubic gel particles contain as compound (i) a mixture consisting of from 1% to 50% by weight of phytanetriol relative to the weight of the mixture and from 50% to 99% by weight of unsaturated fatty acid monoglyceride relative to the weight of the mixture.

14. (Original): The method of claim 7, wherein said dispersing and stabilizing agent is selected from the group consisting of:

- (1) alkyl or alkenyl ethers or esters of a polyol,
- (2) N-acyl amino acids and derivatives thereof, and peptides N-acylated with an alkyl or alkenyl radical, and salts thereof,
- (3) alkyl or alkenyl ether or ester sulphates, derivatives thereof and salts thereof,
- (4) polyoxyethylenated fatty alkyl or alkenyl ethers or esters,
- (5) polyoxyethylenated alkyl or alkenyl carboxylic acids and salts thereof,
- (6) N-alkyl or alkenyl betaines,
- (7) alkyl or alkenyl trimethylammoniums and salts thereof, and
- (8) mixtures thereof.

15. (Original): The method of claim 5, wherein said cubic gel particles have a size ranging from 0.05  $\mu\text{m}$ . to 1  $\mu\text{m}$ .

16. (Original): The method of claim 7, wherein said cubic gel particles have a size ranging from 0.05  $\mu\text{m}$ . to 1  $\mu\text{m}$ .

17. (Original): The method of claim 6, wherein the dispersion of cubic gel particles further comprises at least one water-insoluble ionic amphiphilic lipid.

18. (Original): The method of claim 17, wherein said water-insoluble ionic amphiphilic lipid is at least one selected from the group consisting of:

- (i) phospholipids,
- (ii) phosphoric esters of fatty acids,
- (iii) water-insoluble N-acyl derivatives of glutamic acid and salts thereof,
- (iv) sodium cetyl sulphate,
- (v) sodium cocoylmonoglyceride sulphate, and
- (vi) water-insoluble quaternary ammonium derivatives.

19. (Original): The method of claim 5, wherein said cubic gel particles further comprise at least one hydrophilic and/or lipophilic active principle.

20. (Original): The method of claim 7, wherein said cubic gel particles further comprise at least one hydrophilic and/or lipophilic active principle.

21. (Original): The method of claim 5, wherein the cubic gel particles are present in an amount ranging from 0.1% to 20% by weight relative to the total weight of the composition.

22. (Original): The method of claim 7, wherein the cubic gel particles are present in an amount ranging from 0.1% to 20% by weight relative to the total weight of the composition.

23. (Previously Presented): A treatment process for protecting a keratin material against the effects of pollution, comprising applying to a keratin material in need of protection from the effects of pollution a composition comprising a pollutant penetration limiting effective amount of phytanetriol in a physiologically acceptable medium.

24. (Previously Presented): A treatment process for improving the cell respiration and/or for reducing the desquamation of a keratin material and/or for preventing an increase in sebum flow from a keratin material comprising applying to a keratin material in need of said improvement, reduction and/or prevention a composition comprising a pollutant penetration limiting effective amount of phytanetriol in a physiologically acceptable medium.

25. (Canceled).

26. (Original): The process of claim 23, wherein said is an emulsion.

27. (Original): The process of claim 23, wherein the phytanetriol is in the form of cubic gel particles.

28. (Original): The process of claim 23, wherein said keratin material is the skin.

29. (Original): The process of claim 24, wherein said is an emulsion.

30. (Original): The process of claim 24, wherein the phytanetriol is in the form of cubic gel particles.

31. (Original): The process of claim 24, wherein said keratin material is the skin.

32-36. (Canceled).